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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DETRICK PAUL RICHMOND, Defendant and Appellant.	B283521 (Los Angeles County Super. Ct. No. NA100228)

APPEAL from a judgment of the Superior Court of Los Angeles County, Judith L. Meyer, Judge. Affirmed.

Janet Gusdorff, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Detrick Paul Richmond appeals his conviction of multiple counts of forcible rape and forcible oral copulation and single counts of burglary, robbery and dissuading a witness. He contends the trial court abused its discretion in permitting an experienced sex crimes investigator to testify that crime victims are not generally consistent in relating their version of events at different points in time. He further contends that the sentence -- totaling 185-years to life -- represented cruel and unusual punishment, and that the court erred in concluding he had sufficient opportunity to reflect on his actions to warrant imposition of a separate sentence on one of the counts of forcible rape. Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Information*

Appellant was charged by information with three counts of forcible rape (Pen. Code, § 261, subd., (a)(2),[1] counts one through three), two counts of forcible oral copulation (§ 288a, subd., (c)(2)(a), counts four and five), one count of first degree burglary (§ 459, count 6), one count of first degree residential robbery (§ 211, count seven), and one count of dissuading a witness (§ 136.1, subd. (b)(1), count eight).[2] It was further alleged with respect to all counts that

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[1] Undesignated statutory references are to the Penal Code.

[2] A ninth count for assault with a deadly weapon was dismissed during trial.

appellant personally used a knife within the meaning of section 12022, subdivision (b)(1), and that the offenses in counts one through five occurred during the course of a burglary within the meaning of section 667.61, subdivision (a) and (d).[3]

B. *Evidence at Trial*

1. *Prosecution Evidence*

Carolina E. lived in a ground floor studio apartment on Ocean Boulevard in Long Beach. She testified that on September 7, 2014, shortly after midnight, she returned to her apartment after spending the evening with friends. She drove into the parking garage and went directly from there to her unit, without going outside. Before going to bed, she opened the kitchen window slightly to let in some air. There was a screen on the window. Carolina fell asleep on top of her covers, wearing underwear and a camisole. Her television was on.

Carolina was awakened by the sound of someone in her apartment. She identified appellant in court as the intruder. She had never seen him before. She told him to get out. Appellant, holding a knife in his right hand, approached the

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[3] Section 667.61 provides for a 15-year-to-life sentence for a person who commits forcible rape or forcible oral copulation during the commission of a burglary of the first degree; if the burglary was committed with the specific intent to commit forcible rape or oral copulation, the term of imprisonment increases to 25 years to life. (§ 667.61(a), (c)(1), (c)(7) & (d)(4).)

bed and told Carolina to shut up or he would kill her. He pulled her underwear down and removed his pants. He touched her vagina and told her he would cut her if she did not open her legs. After putting his mouth on her vagina, appellant had vaginal intercourse with her while she was lying on her back, laying the knife down briefly. This continued "for some time" while Carolina pleaded with him to stop. Appellant next removed his penis and turned her around so she was on her hands and knees, reinserted his penis into her vagina, and continued intercourse. After a period, he asked if she had a favorite position; she said on her back because she wanted to keep her eyes on his hands and the knife. Appellant withdrew his penis, turned her around, reinserted his penis into her vagina and continued intercourse. He again put the knife to her throat. After he withdrew for the third time, appellant ordered Carolina to give him oral sex and held the knife to her neck, again threatening to cut her.

After appellant finished, he asked Carolina if she had money. She said there might be $5 in her purse. He took several items from her home, including two Michael Kors handbags, a Coach bag, and a pair of Coach sunglasses, worth close to $2,000 in total. Carolina's cell phone was in one of the bags. She told appellant to take anything he wanted and "just leave." Appellant left through the kitchen window. Before he left, he threatened to kill her if she told anyone what happened, adding "I know where you are." Before he left, Carolina saw that the window was fully open.

Immediately after appellant left, Carolina got up, wrapped herself in a blanket and went out into the hallway. She screamed and knocked on her neighbor's door, but when no one answered, she went upstairs to the manager's apartment. She told the manager there had been a robbery. The manager called 911.[4] Carolina waited in the lobby, but when the police did not arrive, she returned to the manager's apartment to call again. This time, she said she had been raped and spoke directly to the 911 operator.

A police officer arrived during the second 911 call. Carolina told the officer she had been raped and was taken to a hospital for a sexual assault exam. The nurse examiner took a number of swabs from various places on her body. Some of the DNA in the swabs matched appellant's DNA; some partially matched his DNA; some came back negative.

The officers who came to investigate found the kitchen window screen in a meter box located in a breezeway outside the kitchen window. They found impressions from a size seven Michael Jordan shoe on the ground in the breezeway and on the kitchen table.[5] The criminalist found 11 prints inside the apartment. Appellant's prints matched four -- two on the inside of the kitchen wall near the window, one on the top of the kitchen table, and one on a kitchen chair. Detective Louie Galvan, assigned to investigate the crime, noticed

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[4] A recording of the 911 call was played for the jury.

[5] When appellant was arrested he was wearing size seven Air Jordans. He was in possession of a knife.

that when standing in the breezeway, looking through the kitchen window, he could see Carolina's bed.

Carolina testified she made a point of observing her assailant's face and features. Although he was wearing a long shirt, he occasionally pulled it up, allowing her to notice his unusual chest hair pattern. She gave a detailed description to the police, the examining nurse and a sketch artist. She also identified appellant from a photographic lineup, becoming very emotional and shaky when she saw appellant's face in the lineup.

Evidence was presented that Carolina's cell phone, along with her purses and sunglasses, were found in appellant's possession.

2. *Defense Evidence*

Appellant testified that on the night of September 6, 2014, he was in the area of Carolina's apartment, socializing with friends, including Ruben Aispuro. He and some of his friends went into an alley near Aispuro's apartment after hearing a car honking. He was standing in the alleyway smoking marijuana with "Sean" and "Johnny" when he saw Carolina walking in the alley and went to introduce himself. They chatted and she invited him back to her apartment.[6] After talking for a while, they kissed and removed their clothing. When he was pulling his pants down, appellant

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[6] One of appellant's friends, Desean Armstrong, testified that he saw appellant talking with someone in the alley, but was too far away to identify or describe the person.

took some items out of his pocket, including a box cutter. They engaged in oral sex. Appellant put on a condom and they engaged in intercourse, first facing each other, then with him behind her, then with him facing her again. He changed positions because she said she preferred face to face. After he was finished, appellant went into the bathroom to flush the condom and Carolina fell asleep. Appellant dressed himself and made the decision to steal Carolina's cell phone and purses. After gathering them, he noticed the kitchen window was open and decided to exit through there rather than the door. He climbed onto the kitchen table and left through the window, after removing the screen. Once outside, he decided to hide the window screen, which was lying on the ground, in the meter box.[7]

Appellant called Dr. Robert Shomer, an expert in eyewitness perception. Dr. Shomer testified that when human beings are in stressful situations, they are generally unable to perceive details, and their subsequent descriptions of what they experienced will necessarily be affected. The presence of a weapon adds to the stress level, generally causing the person being threatened to focus on the weapon rather than the assailant. Proximity to the assailant also increases stress. Dr. Shomer considered it unlikely that a

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[7] Appellant acknowledged having pled no contest to a misdemeanor domestic violence charge in February 2014 and misdemeanor petty theft in March 2010. In addition, he acknowledged having been convicted of two counts of vandalism in April 2005.

person experiencing a sudden, stressful situation would be able to provide a detailed description of the event or the people involved.

Defense counsel recalled Detective Galvan to question him about discrepancies between Carolina's testimony and the statement she gave him after the attack. On cross-examination, the prosecutor asked Detective Galvan if, in his experience as a sex crimes investigator, it was "common for a victim to leave out some of the details during some of the interviews and provide them at other times." He responded "very common." Defense counsel objected on the ground the detective was "attesting to the credibility of a witness." The court overruled the objection. The detective further stated: "I've never come across a victim who can repeat the same story over and over, identically. They're not robots, and a lot --." Defense counsel objected on the grounds of "improper opinion testimony" and "improper bolstering." The court overruled the objections "because of [the detective's] 15-years[']experience," adding, "I think he's answered the question. [¶] Go ahead. Next question."

C. *Verdict and Sentencing*

The jury found appellant guilty of all three counts of forcible rape, both counts of forcible oral copulation, and each count of first degree burglary, first degree robbery and dissuading a witness. It found true that appellant committed the rapes and oral copulation offenses during the commission of a burglary committed with the intent to

commit rape or forcible oral copulation within the meaning of section 667.61. It further found true that appellant personally used a deadly and dangerous weapon, a knife, during the commission of all the offenses.

The court imposed indeterminate terms of 35 years to life for each count of rape and oral copulation (25 years to life for the crime and 10 years for use of the weapon), and 10 additional years for robbery and dissuading a witness.[8] The court ordered all sentences to run consecutively.

At the hearing, the court expressed its understanding that section 667.6 subdivision (d) required the sentences on counts one through five to be consecutive if there was "a reasonable break in time to reflect." The court concluded appellant's actions in shifting from vaginal sex to oral sex required a break in his mental process, and that because the two acts of oral sex occurred at two separate points during the attack, consecutive sentences were required for those offenses. With respect to the vaginal sex, the court stated: "[T]here was enough state of mind to ask if she wanted a different position. So if there was a different position being asked [sic] . . . then pursuant to that, I think there is a break in the state of mind, and that, by definition [section 667.5, subdivision (d) applies], which requires a mandatory consecutive sentenc[e]." The court went on to state, that if its analysis concerning section 667.6, subdivision (d) was found to be incorrect, it would exercise its discretion to

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[8] The sentence on count six, the burglary, was stayed pursuant to section 654.

impose the same sentence under section 667.6, subdivision (c). The court noted the multiple threats of violence, appellant's prior record, and the "disgusting" nature of his actions. Appellant noticed an appeal.

DISCUSSION

A. *Detective Galvan's Testimony*

Appellant contends the prosecutor elicited improper expert testimony from Detective Galvan that resulted in his vouching for the veracity of Carolina, and that the trial court abused its discretion in overruling defense counsel's objections. We disagree.

A witness may testify as an expert if the subject matter is "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact" and the testimony is "[b]ased on matter . . . that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates." (Evid. Code, § 801.) A person may be qualified to testify as an expert if he or she "has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates . . . ." (Evid. Code, § 720.) The determination that a witness qualifies as an expert "rests in the sound discretion of the trial court" and will not be disturbed on appeal "[a]bsent a manifest abuse . . . ." (*People v. Ramos* (1997) 15 Cal.4th 1133, 1175.)

Detective Galvan had been a sex crimes investigator for 15 years. He did not claim to have inside knowledge of

whether Carolina was telling the truth or claim that his experience allowed him to confirm her veracity. He merely testified that it is not unusual for victims of crimes to remember events differently when recounting the facts on different occasions. The testimony was properly admitted. (See *People v. Dunnahoo* (1984) 152 Cal.App.3d 561, 577 [police officers who qualified as experts in the field of child molestation permitted to testify based on their training and experience that sexually molested child has difficulty talking about sexual abuse with adults].) Moreover, to the extent that there was "nothing beyond the juror[s'] understanding or common experience" that required the testimony, as appellant contends, any error in admitting it was harmless. In light of the overwhelming evidence substantiating Carolina's version of events, we find virtually no possibility that the jury's assessment of her credibility was affected by Detective Galvan's observation that witnesses rarely repeat an account using identical words.

B. *Cruel and Unusual Punishment*

Section 667.61 provides an alternative sentencing scheme that applies to specified felony sex offenses, including forcible rape and oral copulation, when they occur under certain circumstances. (See *People v. Anderson* (2009) 47 Cal.4th 92, 102; *People v. Reyes* (2016) 246 Cal.App.4th 62, 79 (*Reyes*).) The purpose of the law is "'"to ensure serious and dangerous sex offenders would receive lengthy prison sentences upon their first conviction," "where the nature or

method of the sex offense 'place[d] the victim in a position of elevated vulnerability.'"'" (*Reyes*, *supra*, at p. 79, quoting *People v. Alvarado* (2001) 87 Cal.App.4th 178, 186 (*Alvarado*), italics omitted.) Appellant contends the sentence imposed under section 667.61 is cruel and unusual, in particular, the additional sentence imposed for the final act of rape that occurred when he changed Carolina's position after asking which position she preferred. We conclude he has not met the heavy burden of establishing that his sentence violated either the Eighth Amendment or the California Constitution.

The Eighth Amendment to the United States Constitution applies to the states and "prohibits the infliction of 'cruel and unusual' punishment." (*People v. Baker* (2018) 20 Cal.App.5th 711, 723.) "Article I, section 17 of the California Constitution prohibits infliction of '[c]ruel or unusual' punishment." (*Ibid.*, italics omitted.) Although articulated slightly differently, "[t]here is considerable overlap in the state and federal approaches," both of which prohibit "'punishment that is "grossly disproportionate" to the crime or the individual culpability of the defendant.'" (*Id.* at p. 733.)

The Eighth Amendment's ban on cruel and unusual punishment embodies the precept that "'"punishment for crime should be graduated and proportioned to [the] offense."'" (*In re Coley* (2012) 55 Cal.4th 524, 538.) It does not require "'"strict proportionality between crime and sentence," but rather "forbids only extreme sentences that

are 'grossly disproportionate' to the crime.'"'" (*Id.* at p. 542.) To determine the presence or absence of gross disproportionality, courts "'begin by comparing the gravity of the offense and severity of the sentence. [Citation.]'" (*Ibid.*) It is only in the "'"'rare case in which [this] threshold comparison . . . leads to an inference of gross disproportionality'"' that the court should then "'compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions.'" (*Ibid.*)

A punishment may violate the California Constitution if it is "'so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.'" (*People v. Crooks* (1997) 55 Cal.App.4th 797, 806 (*Crooks*), quoting *In re Lynch* (1972) 8 Cal.3d 410, 424.) In deciding the question under the California Constitution, courts "first examine 'the nature of the offense and the offender, with particular regard to the degree of danger which both present to society'"; then "compare the challenged penalty to 'punishment prescribed in the same jurisdiction for other more serious offenses'"; and finally, "compare the challenged penalty to 'punishment prescribed for the same offense in other jurisdictions.'" (*Crooks*, *supra*, at p. 806, quoting *People v. Thompson* (1994) 24 Cal.App.4th 299, 304.) Determining "'the nature of the offense and the offender,'" requires consideration of "not only the offense as defined by the Legislature but also 'the facts of the crime in question' (including its motive, its manner of

commission, the extent of the defendant's involvement, and the consequences of his acts)," as well as "the defendant's individual culpability in light of his age, prior criminality, personal characteristics, and state of mind." (*Crooks*, *supra*, at p. 806, quoting *People v. Thompson*, *supra*, 24 Cal.App.4th at p. 305.)

"Outside the death penalty context, '"successful challenges to the proportionality of particular sentences have been exceedingly rare."'" (*Reyes*, *supra*, 246 Cal.App.4th at p. 83, quoting *Ewing v. California* (2003) 538 U.S. 11, 21.) "There is no question that 'the fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is "properly within the province of legislatures, not courts."'" (*Reyes*, *supra*, at p. 83, quoting *Harmelin v. Michigan* (1991) 501 U.S. 957, 998.) "It is for this reason that when faced with an allegation that a particular sentence amounts to cruel and unusual punishment, '[r]eviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes . . . ." (*Reyes*, *supra*, at p. 83, quoting *Solem v. Helm* (1983) 463 U.S. 277, 290.)

Lengthy sentences imposed under section 667.61 have been upheld by multiple courts. (*Reyes*, *supra*, 246 Cal.App.4th at pp. 86, 90; *Crooks*, *supra*, 55 Cal.App.4th at pp. 806, 809; *Alvarado, supra,* 87 Cal.App.4th at p. 201.) In *Alvarado*, the appellate court, considering a challenge to the 15-year-to-life sentence of a defendant convicted of rape

during the commission of a burglary, concluded: "[The] defendant has failed to establish that his sentence is so disproportionate to his crimes that it shocks the conscience or offends fundamental notions of human dignity." (*Alvarado, supra,* at pp. 183, 185, 201; see § 667.61, subd., (e)(2).) The court pointed out that the provision "reflects a legislative finding that the victims of a residential burglary are more vulnerable because they are inside a structure rather than out in public," and that the Legislature "sought to deter by harsher punishment those who burglarize homes and exploit the vulnerability of people inside to commit sex offenses." (*Alvarado*, *supra*, at pp. 186-187.) Addressing the defendant's contention that his sentence was roughly the same as for second degree murder, the court observed: "Although the finality of the consequences of second degree murder make that crime categorically different from rape during a burglary, the double trauma of having one's home invaded and then being sexually violated is substantial. Moreover, second degree murder does not require a specific intent to kill or commit a felony and requires only that a person willfully and knowingly perform an act dangerous to life with conscious disregard for life. [Citations.] On the other hand, rape during a burglary reflects that the person decided to enter another's residence for a felonious purpose and also decided to commit a sexual assault inside. Contrary to defendant's argument, we cannot say that punishing such conduct as severely as second degree murder is either shocking or outrageous." (*Id*. at p. 200.) Although

the court found that California "has taken the most aggressive approach toward punishing and deterring rape during the commission of a burglary," due to the mandatory nature of the punishment, it further found that other jurisdictions "allow for the same or even harsher punishment . . . ." (*Ibid.*) The fact that sentences under the provision are mandatory and not subject to judicial discretion, "merely reflects the Legislature's zero tolerance toward the commission of sexual offenses against particularly vulnerable victims" and did not require a finding that the sentence was excessive as a matter of law. (*Id.* at pp. 200-201.)

In *Crooks*, the court rejected the defendant's challenge to his 25-year-to-life sentence for committing a rape in the course of committing a first-degree burglary, initiated with the intent to commit rape. In examining the specific facts of the offense, the court observed that the defendant's crimes, which included "callous[ly] . . . choosing to prey on a sleeping victim," were "extremely serious and dangerous to society in themselves," and that "it was only by chance that he did not inflict far more serious injury on the victim, either through the act of rape itself or through use of the knife with which he had equipped himself." (*Crooks, supra,* 55 Cal.App.4th at p. 807.) The defendant's contention that the penalty was harsher than those imposed for any type of unlawful killing short of first degree murder, "ignore[d] the fact that defendant's acts involved both the commission of more than one kind of offense (rape and first degree burglary) and the

commission of one offense for the purpose of committing another. The penalties for single offenses, such as those defendant cites, cannot properly be compared to those for multiple offenses -- especially where, as here, one offense was committed in order to commit another. Moreover, the gravity of the two crimes committed by defendant (burglary and rape) is greater than the sum of their parts: being raped in her own home is a woman's worst nightmare." (*Ibid.*) The court further observed that "[t]he Legislature has chosen to make other offenses not involving homicide punishable by life imprisonment without the possibility of parole: kidnapping for the purpose of ransom, extortion or robbery with bodily harm short of death [citation] and attempted train wrecking [citation]. . . . A fortiori, if offenses such as aggravated kidnapping for ransom and attempted train wrecking, even absent death, may be punished by LWOP [life without possibility of parole] without offending California's bar against cruel or unusual punishment, it cannot offend that constitutional provision to punish the combination of offenses defendant committed by a life sentence with the possibility of parole" (*Id.* at pp. 807-808.)

The court further found appellant had failed to establish that the punishment prescribed for his offense was excessive when compared to the punishment imposed for similar offenses in other jurisdictions, noting that in *Solem v. Helm*, *supra*, 463 U.S. 277, the U.S. Supreme Court had rejected an Eighth Amendment attack on Louisiana's mandatory sentence of LWOP for aggravated rape "because

at least four other jurisdictions provided for life sentences for rape." (*Crooks*, *supra*, 55 Cal.App.4th at p. 808.)

Here, appellant deliberately broke in on his sleeping victim and committed multiple acts of sexual aggression on her while she was alone, naked and vulnerable. He repeatedly threatened her with his knife, placing it near her vagina and pressing it against her throat. The sentence imposed, basically an LWOP sentence regardless of whether the sentence for the final act of rape is included, was the result of the jury's finding of multiple instances of forcible rape and forcible oral copulation inflicted over a period of time. Appellant followed up his sexual assaults by robbing the victim of multiple valuable items, including the cell phone she needed to call for assistance. Under these circumstances, the sentence imposed was not cruel and unusual under either the California or federal standard.

C. *Consecutive Sentencing*

Section 667.6, subdivision (d), requires separate and consecutive terms to be served for rape and forcible oral copulation "if the crimes involve separate victims or involve the same victim on separate occasions." It goes on to state: "In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither

the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions." A "separate occasions" finding under section 667.6, subdivision (d) will be reversed "only if no reasonable trier of fact could have decided the defendant had a reasonable opportunity for reflection after completing an offense before resuming his assaultive behavior." (*People v. Garza* (2003) 107 Cal.App.4th 1081, 1092.)

Appellant contends consecutive sentencing for the forcible rape count was improper because it was not preceded by a reasonable opportunity to reflect. We discern no error.

Preliminarily, we note that subdivision (c) of section 667.6 gives the trial court *discretion* to impose separate and consecutive terms for forcible rape and oral copulation "if the crimes involve the same victim on the same occasion." Here, the trial court made clear that in the absence of the mandatory directive, it would exercise its discretion to impose consecutive sentences under this provision. Accordingly, even were we convinced the crimes were not sufficiently separated to meet the requirements of subdivision (d) of section 667.6, we would have no need to remand for imposition of a different sentence. (See *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110 ["Remand is required unless the record reveals a clear indication that the

trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so."].)

Moreover, we find no fault in the trial court's determination that the offenses were sufficiently separated to warrant imposition of separate terms under the statutory definition, which requires no specific "duration of time between crimes" but only "a reasonable opportunity to reflect upon his or her actions." (See *People v. Jones* (2001) 25 Cal.4th 98, 104 ["Under the broad standard established by Penal Code section 667.6, subdivision (d), the Courts of Appeal have not required a break of any specific duration or any change in physical location."]; see, e.g., *People v. King* (2010) 183 Cal.App.4th 1281, 1325-1326 [trial court reasonably concluded that sexual offenses occurred on separate occasion where defendant briefly paused when he saw the headlights of a passing car].) As the court observed, the fact that appellant paused long enough to inquire of Carolina what her "favorite position" was demonstrates not only that he had the opportunity to reflect on his actions, but that he did so.

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DISPOSITION

The judgment is affirmed.

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MANELLA, P. J.

We concur:

COLLINS, J.

CURREY, J.